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Supreme Court of the United States

October Term, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent.

BRIEF OF PETITIONERS

CHARLES E. LESTER, JR.,
STEPHENS L. BLAKELY,
Proctors for Petitioners.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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THE OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported in 186 F. (2d) 297, and is printed in full in the Record (R. 24-34).

The second Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit was entered October 20, 1952, appears at R. 71, has been forwarded to the publisher for publication, and will be reported in 199 F. (2d) 760.

JURISDICTION

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1254, U. S. C., Supreme Court Rule 38 (5) (b).

(a) The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. In the opinion below (R. 28) the court said: "Viewing the question as an open one, therefore, not ruled upon by the Supreme Court" and held the general maritime law controlling as opposed to the law of Kentucky which created the right sued upon, thereby presenting the spectacle of a double system of conflicting laws in the same state in actions founded on the same state statute. The cause of action is grounded upon Kentucky Revised Statutes Sec. 411.130 (wrongful death) and if same had been litigated in a Kentucky court would have suffered death under sentence of the statute of limitations, Kentucky Revised Statutes Sec. 413.140, as held by the Court of Appeals of Kentucky in the case of **Vassill's Adm'r v. Scarsella**, 1942, 292 Ky. 153, 166 S. W. (2d) 64, and **Jewel Tea Co. v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66. The opinion of the United States Court of Appeals gives one asserting a right (action for wrongful death) created by Kentucky law preferential treatment if an admiralty court be selected as the forum as compared to a litigant asserting his right under the same statute because of a terrene tort either in a court of Kentucky of a federal common law court.

(b) The United States Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. The libel in the case at bar asks enforcement of a state-created right borrowed by the admiralty. A remedy for wrongful death was unknown to the maritime law. **Lindgren v. U. S.**, 1930, 281

U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686. It was, however, adopted by the admiralty and enforced long ago. **The Harrisburg**, 1886, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358. And, since **The Harrisburg** decision enforcement of state wrongful death statutes in the admiralty has been expressly justified (**Western Fuel Co. v. Garcia**, 1921, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210) under the "maritime but local" doctrine, i.e., the nature of the remedy is such that it does not affect the uniformity requirement in admiralty.

The opinion of the United States Court of Appeals in the instant case seems to indicate that for the sake of uniformity in the admiralty practice, the general maritime law and not the local law must be followed. The opinion ignores the "maritime but local" doctrine that uniformity in the admiralty practice is not required when the admiralty court is the forum selected to enforce a state-created right unknown to the admiralty. In **Western Fuel Co. v. Garcia**, supra, the court hinted that if a state creates a right, and the admiralty borrows it, then logic suggests such right ought to be taken with all its imperfections and limitations and that the requirement of uniformity in admiralty furnishes no basis for argument to the contrary. The enforcement of such a state-created right in an admiralty court is permissible only under the "maritime but local" doctrine and is an exception to the requirement of uniformity in maritime law. (**Just v. Chambers**, 1941, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903.)

This litigation is an attempt to enforce in admiralty a right created by local (Kentucky) law and the decision of the Court of Appeals is in direct conflict with the Kentucky decisions cited in (a) hereof, **Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r.** This conflict ought to be resolved by the Supreme Court.

(c) The United States Court of Appeals has decided a federal question in a way probably in conflict with the ap-

plicable decision of the Supreme Court of the United States in **Just v. Chambers, supra**, and **Standard Dredging Corporation v. Murphy**, 1943, 319 U. S. 306, 309, 63 S. Ct. 1067, 87 L. Ed. 1416, in not applying the doctrine that, "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved."

STATEMENT OF THE CASE

This is a suit in admiralty filed by William Deupree, Jr., as ancillary administrator of the estate of Katherine Wing, deceased, in the United States District Court for the Eastern District of Kentucky to recover damages for the wrongful death of Katherine Wing, a resident of New York State, who died on June 19, 1948, as a result of injuries received in a boat collision on the Ohio River in Campbell County, Kentucky. Katherine Wing was a passenger in a motor boat owned and operated by the petitioner, Louis Levinson, which collided with a motor boat owned and operated by the petitioner, Mitchell A. Hall, it being alleged in the libel that the collision was a result of the negligence of both petitioners.

The libel filed in the District Court on December 7, 1948, in addition to alleging the facts of the incident, sets forth the appointment of a domiciliary administratrix in New York on October 22, 1948, and the appointment of William Deupree, Jr., as ancillary administrator of decedent's estate by the County Court of Kenton County, Kentucky, on December 7, 1948 (R. 1). To the libel both petitioners on March 23, 1949, filed answers in the nature of general denial (R. 4-8). On July 7, 1949, the ancillary administrator filed an affidavit for leave to sue in forma pauperis wherein he stated that "libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given" (R. 8-9). Petitioners immediately filed special demurrers to

the libel, asserting that upon the face of the record the court was without jurisdiction to try the case, that it had no jurisdiction of the subject matter, and that the ancillary administrator did not have legal capacity to sue (R. 9-12). The District Court read into the libel the affidavit of the ancillary administrator for leave to proceed in forma pauperis and considered both the libel and the affidavit on the special demurrer and held that these two documents showed that the injury to decedent from which death resulted occurred in Campbell County, Kentucky, and that the decedent possessed no estate in Kenton County, Kentucky, and that therefore the appointment of the ancillary administrator in Kenton County was void and sustained the special demurrer, granting leave to the ancillary administrator to file an amended libel (R. 15-16). The amended libel tendered on July 29, 1949, and ordered filed on September 9, 1949 (R. 15-16) alleged that on July 28, 1949, William Peupree, Jr., had been appointed ancillary administrator in Campbell County, Kentucky, and that the libel was brought by him in his capacity as ancillary administrator appointed in both Kenton and Campbell Counties, Kentucky (R. 12-15). In all other respects the amended libel was identical with the original one. To the libel as amended petitioners thereupon demurred generally on the ground that no cause of action was stated, again asserting as on the special demurrer that the order of the Kenton County Court appointing the administrator was void and contending further that the Campbell County appointment could not sustain the suit because made more than one year after the infliction of the fatal injury, the period of limitation on death actions in Kentucky being one year from the date of death (R. 16-18). The District Court sustained the general demurrers (R. 19) and, upon the ancillary administrator's declining to plead further, entered judgment dismissing the libel as amended (R. 21).

The ancillary administrator appealed from the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit and it in an opinion dated December 22, 1950, reversed the judgment of the District Court and remanded the cause for further proceedings in accordance with its opinion (R. 24-34).

Petition for a writ of certiorari was denied April 23, 1951, **Levinson, et al. v. Deupree, etc.**, 341 U. S. 915, 71 S. Ct. 736, 95 L. Ed. 1351.

Upon remand to the District Court the general demurrers to the libel as amended were overruled in accordance with the mandate of the Court of Appeals (R. 35), issue was joined by the answers of petitioners to the libel as amended (R. 36-43) and respondent's reply to such answers (R. 49-50), and upon the issue thus joined a trial resulted in a joint and several decree in favor of respondent and against petitioners in the sum of $30,000.00 and costs (R. 63).

Upon appeal by petitioners to the United States Court of Appeals for the Sixth Circuit, the decree of the District Court was on October 20, 1952, affirmed (R. 71).

ASSIGNMENT OF ERRORS

The United States Court of Appeals for the Sixth Circuit erred:

(1) In holding that the state (Kentucky) law is not controlling;

(2) In refusing to extend the doctrine of **Erie R. Co. v. Tompkins**, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and **Guaranty Trust Co. v. York**, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231, to this case in admiralty for wrongful death founded upon a state (Kentucky) statute;

(3) In refusing to hold that uniformity in the admiralty practice is required only when the essential features of an exclusive federal jurisdiction are involved as held by this

Court in **Just v. Chambers** and **Standard Dredging Corporation v. Murphy**, both supra, and in each of which the "maritime but local" doctrine was again applied.

SUMMARY OF ARGUMENT

This case requires the determination of the question whether admiralty courts, when invoked to enforce rights created by state law and unknown to admiralty, are bound by the law of such state, or the general maritime law. The argument of petitioners is (1) that respondent's right to sue for wrongful death of his decedent upon the navigable waters (Ohio River) of Kentucky is given him by Kentucky Revised Statutes Sec. 411.130, (2) that absent such statute respondent would have no cause of action, wrongful death actions being unknown to admiralty as held in **The Harrisburg**, supra, (3) that upon the state of the pleadings as appear in the Transcript of Record herein, respondent's case under Kentucky law would have suffered death under sentence of the limitation statute, Kentucky Revised Statutes Sec. 413.140, if litigated in a Kentucky court as held by the Court of Appeals of Kentucky in **Vassill's Adm'r v. Scarsella**, and **Jewel Tea Company v. Walker's Adm'r**, both supra, (4) that Kentucky having created respondent's right to sue and admiralty permitting its enforcement under the "maritime but local" doctrine (**Just v. Chambers**, supra), such permissive enforcement is taken with all its imperfections and limitations (**Western Fuel Company v. Garcia**, supra), and the requirement of uniformity in admiralty furnishes no basis for argument to the contrary, and (5) that since Kentucky created respondent's right to sue but denies recovery because of limitations, respondent's choice of a federal court to litigate such state-created right should not give him advantage denied by Kentucky courts, and the rule of **Erie Railroad v. Tompkins**, and **Guaranty Trust Company**

v. York, both supra, should be here applied to the end that "The outcome of litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

ARGUMENT

Preliminary

The basis of the jurisdiction of the United States District Court to entertain this cause is founded upon the following:

(1) United States Constitution Article III, Section II.

(2) Kentucky Revised Statutes Sec. 411.130 (Lord Campbell's Act in Kentucky).

(3) A valid order of a Kentucky county court appointing administrator (**Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r**, both supra).

(4) The filing of a libel by such administrator appointed by a county court having jurisdiction and the issuance of process and service thereof upon petitioners.

Absent any of the foregoing the District Court was without jurisdiction of either the cause or the persons of petitioners.

Except for Section II of Article III of the Constitution of the United States no federal court could have jurisdiction in admiralty. Courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them. 35 C. J. S. 784, Sec. 6, Notes 38 and 39.

Without (2), Kentucky's modern counterpart of Lord Campbell's Act, the wrongful death statute, respondent had no cause in any court, either state or federal. This has ever been the rule as first stated by the United States Supreme Court in **The Harrisburg**, supra, which has been consistently followed by the courts since its decision in the

year 1886 down through **Just v. Chambers**, supra, and **American Stevedores v. Porello**, 1947, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011.

The last line of Subsection 1 of Kentucky Revised Statutes Sec. 411.130 is in this language: "The action shall be prosecuted by the personal representative of the deceased."

Since the chose in action for the wrongful death of respondent's decedent is vested in the personal representative, absent (3), a valid order of a Kentucky county court appointing an administrator, there would be no controversy. Such order must be valid. **Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r**, both supra.

Without (4) there would, of course, be no controversy at all. It needs no citation of authority to support the statement that except for the filing of the libel by an administrator having the right to file same, coupled with the issuance of process and service thereof, there would be nothing now before the Court.

All Defenses Available in a Kentucky Court in a Suit for Wrongful Death Are Equally Available in Admiralty

The cause of action attempted to be stated in the libel and amendment being founded upon Kentucky law, all limitations on that right or cause of action imposed by the Kentucky law must be given effect, and, all defenses available under Kentucky law which would bar recovery in a Kentucky court are a bar to recovery upon the same cause in a court of admiralty.

Respondent's right to and cause of action is given him by the Kentucky wrongful death statute, Kentucky Revised Statutes Sec. 411.130, the first subsection and pertinent portion of which is in this language:

> "Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from

the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased."

A few of the cases enunciating the rule just stated and which followed **The Harrisburg** are in part next hereinafter quoted.

The A. W. Thompson, 39 Fed. 115, at Page 117, decided in 1889:

> "The action rests entirely upon the state statute. Any defense, therefore, that would bar recovery in the state courts, with reference to which the statute must be deemed enacted, must be held equally good in the admiralty."

Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303, certiorari denied, **Bisso v. Quinette**, 199 U. S. 606, 26 S. Ct. 746, 50 L. Ed. 330, decided in 1905, after citing the wrongful death statute of Louisiana, said:

> "Without this statute the libelant could not maintain her libel. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel."

In **Truelson v. Whitney, etc.**, 10 Fed. (2d) 412, decided in 1926, certiorari denied, 271 U. S. 661, 46 S. Ct. 474, 70 L. Ed. 1138, it is said:

> "When such a cause of action is asserted in an admiralty court, it is subject to the same defenses which are open to a defendant under the jurisprudence of the state whose statute gives the right of action."

To the same effect are the cases of **Bloom v. Furness-Withy & Co.**, 293 Fed. 98, decided in 1923, and **O'Brien v. Luckenbach S. S. Co.**, decided by the Circuit Court of Appeals in the same year, 293 Fed. 170. In the **O'Brien** case the court quotes with approval the opinion of Judge Addison Brown in **The A. W. Thompson.** The same rule has been announced by the Court of Appeals for the Sixth Circuit in **Robinson v. Detroit & C. Steam Navigation Co.**, 1896, 73 Fed. 883, 20 C. C. A. 86.

The rule was again stated in 1921 by the United States Supreme Court in **Western Fuel Co. v. Garcia**, supra. There are but two syllabi of the **Garcia** case and we quote them:

> "1. A death upon the navigable waters of a state whose statutes give a right of action on account of death by wrongful act will, when caused by a maritime tort committed on such waters, support a libel in personam in the admiralty courts for the damages sustained by those to whom such right is given.
>
> "2. A state statute prescribing one year as the period within which the statutory action for death caused by wrongful act or negligence shall be brought governs a libel in personam, brought in the admiralty courts, for the damages sustained by those to whom such right of action is given from a death upon the navigable waters of such state, caused by a maritime tort committed on such waters."

It will be seen from the foregoing that *every defense* available in a Kentucky court to a suit brought for wrongful death is available to petitioners in a court of admiralty.

In Kentucky, Actions for Wrongful Death Must Be Brought Within One Year From the Date of Death

The limitations statute in Kentucky which bars recovery of a cause of action asserted for wrongful death is found in the general limitations statute, Kentucky Revised

Statutes Sec. 413.140, the applicable portions of which are as follows:

> "(1) The following actions shall be commenced within one year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant."

This statute, formerly appearing in identical language as Sec. 2516 of Carroll's Kentucky Statutes, has been many times interpreted and construed by the Court of Appeals of Kentucky to mean that wrongful death actions must be commenced within one year from the date of death. This is settled law in Kentucky. A few of the many cases so holding are **Louisville & N. R. Co. v. Simrall's Adm'r,** 1907, 127 Ky. 55, 31 Ky. L. Rep. 1269, 104 S. W. 1011; **Carden Adm'r v. L. & N. R. R. Co.,** 1897, 101 Ky. 113, 39 S. W. 1027; **C. & O. Ry. Co. v. Kelly's Adm'r,** 1899, 20 Ky. L. Rep. 1238, 48 S. W. 993; **Wilson's Adm'r v. I. C. R. R. Co.,** 1906, 29 Ky. L. Rep. 148, 92 S. W. 572; **Nichols v. Chesapeake & O. Ry. Co.,** 1912, 195 Fed. 913, 917; **Jewel Tea Co. v. Walker's Adm'r,** and **Vassill's Adm'r v. Scarsella,** both supra.

The Original Libel Was Bad on Special Demurrer

The libel pleads the residence of decedent in New York and that she was killed in Campbell County, Kentucky, as a result of injuries received there upon the Ohio River and which injuries were caused by the negligence of petitioners and from which her death resulted. The libel further pleads the appointment of respondent to the office of administrator by order of the Court of Probate in and for Kenton County, Kentucky, the Kenton County Court.

It was the contention of petitioners in the District Court, in the Court of Appeals, and it is their contention here,

that the Kenton County Court had *no jurisdiction* to enter an order appointing respondent administrator. Petitioners further contended in those courts and contend here that absent such jurisdiction in the Kenton County Court that the United States District Court was *without jurisdiction* to entertain this cause. That this is the law and ever has been since the first decade of Kentucky's statehood is determined by a reference to the Constitutions of Kentucky, applicable Kentucky statutes of probate, and decisions of her court of last resort, the Court of Appeals of Kentucky.

County courts in Kentucky exist today by virtue of Sections 140 and 141 of her Constitution as adopted September 28, 1891. The two sections read as follows:

> "Sec. 140. Judge; compensation; removal from county vacates office.—There shall be established in each county now existing, or which may be hereafter created, in this state, a court to be styled the county court, to consist of a judge, who shall be a conservator of the peace, and shall receive such compensation for his services as may be prescribed by law. He shall be commissioned by the governor, and shall vacate his office by removal from the county in which he may have been elected.
>
> "Sec. 141. Jurisdiction to be uniform.—The jurisdiction of the county court shall be uniform throughout the state, and shall be regulated by general law, and, until changed, shall be the same as now vested in the county courts of this state by law."

Under the Kentucky Constitution of 1850 the present Section 140 appeared in similar language as Article IV, Sections 29 and 30, and in that instrument the present Section 141 appeared in similar language as Article IV, Section 33.

The probate jurisdiction of county courts in Kentucky is fixed by Kentucky Revised Statutes Sec. 25.110 which reads as follows:

"The county court has jurisdiction to probate wills, appoint and remove personal representatives, guardians, trustees, committees, curators and other fiduciaries, and any other jurisdiction conferred upon it by law."

Jurisdiction of a Kentucky county court to appoint an administrator is found in Kentucky Revised Statutes Sec. 395.030 which reads as follows:

"When a person dies intestate, the county court which would have had jurisdiction to probate his will, had he made a will, shall have jurisdiction to grant administration on his estate."

The particular Kentucky county court where a will may be admitted to probate is determined by a reading of Kentucky Revised Statutes Sec. 394.140 which reads as follows:

"Wills shall be proved before, and admitted to record by, the county court of the testator's residence; if he had no known place of residence in this state, and land is devised, then in the county where the land or part thereof lies; if no land is devised, then in the county where he died, or where his estate or part thereof is, or where there is a debt or demand owing to him."

County courts in Kentucky are courts of limited jurisdiction and derive all their powers from some express statutory enactment. This is the precise holding in **Gilbert v. Bartlett**, 1872, 9 Bush 49, 72 Ky. 49, and quoted with approval in **Commonwealth v. Central Consumers' Co.**, 1906, 122 Ky. 418, 28 Ky. L. Rep. 1363, 91 S. W. 711. If no grant of power is found in the probate statutes of Kentucky, then no such power exists. We quote from **Silbersack v. Kraft, et al.**, 1922, 194 Ky. 587, 240 S. W. 392, from page 395:

"County courts are now and have always been courts of limited jurisdiction and derive all their powers from

some express statutory enactment. **Gilbert v. Bartlett**, 9 Bush 49; **Freeman v. Strong**, 6 Dana 282; **Com. v. Central Consumers' Co.**, 122 Ky. 418, 91 S. W. 711, 28 Ky. L. Rep. 1363; **Chaudet v. Stone**, 4 Bush 210; **Small v. Small**, 2 Bush 45; **Kilbourn v. Chapman**, 163 Ky. 136, 173 S. W. 322; **Tull v. Geohagen**, 3 J. J. Marsh 377; **Russell County v. Hill**, 164 Ky. 360, 175 S. W. 988."

Various acts of the General Assembly of the Commonwealth pertaining to probate matters enacted pursuant to authority and direction of its four constitutions were of import similar to those now embraced in Kentucky Revised Statutes Secs. 25.140, 395.030 and 394.140.

One of the earliest references is to the Act of 1797 found in Littell's Laws of Kentucky cited as 1 Lit. 613, et seq. Reference to his act was made in the early case (1818) of **Embry v. Millar**, 1 A. K. Marshall 221, 8 Ky. 300. In this case the court was called upon to determine the validity of administration proceedings taken out on the estate of one who, prior to his death as an intestate, was domiciled in the dominions of Spain and who at the time of his death was possessed of no personalty in Kentucky. To determine the question, the court was required to inquire into *the jurisdiction of the county court* which granted administration and in passing upon the matter used this language as same appears upon page 222 of the report:

"According to the act of 1797 (1 Lit. 618), it is clear that no other county court can grant administration upon the estate of an intestate than such as might have taken probate of his will, had one been made, so that, in deciding upon the present case, it becomes material to look into the tenth section of the act cited, (1. Lit. 613.) for the purpose of ascertaining the *jurisdiction* of county courts in testamentary matters."

The italics in the foregoing quotation are ours. We use them to emphasize that the question before the court was one of *jurisdiction*, the Court of Appeals holding that in such state of case no county court in Kentucky had *jurisdiction* to grant administration.

Of similar import is the case of **Thumb v. Gresham, etc.**, 1859, 2 Metcalfe 306, 59 Ky. 306, construing Revised Statutes, p. 335, which went into effect on July 1, 1852, and was nearly identical with its modern successors, Kentucky Revised Statutes Secs. 25.110, 394.140 and 395.030. Here the Court of Appeals was again called upon to determine the *jurisdiction* of a county court to appoint an administrator for the estate of a non-resident of Kentucky who had no personal estate in Kentucky. Again the Court held the county court to be without *jurisdiction* and in so doing used this language:

> "Where there are no assets in this State belonging to a decedent who resided in another State, to be administered here, *the county courts have no jurisdiction* to grant administration; and every such grant is void, and confers no power or authority on the person appointed as administrator. It follows that the grant of administration in this case was unauthorized and void, and, therefore, that the plaintiff had no right to bring this action for a settlement of the decedent's estate." (Italics ours.)

In June of the year 1831 the court in **Drake's Adm'r v. Vaughan**, 6 J. J. Marshall 144, 29 Ky. 143, was called upon to determine the *jurisdiction* of a county court to grant administration. Upon page 146 of the report the court said, "The County Court of Fayette had *no jurisdiction* to grant administration on his estate." (Italics ours.) The third syllabus of the case is in this language:

> "Where an intestate is domiciled in a foreign country, and there dies, leaving no property in this State,

no administration can be granted in this country on his estate."

To the same effect is **Fletcher's Adm'r v. Sanders and Wier**, 1838, 7 Dana 345, 37 Ky. 345, the second syllabus of which is as follows:

"No court of this state has *jurisdiction* to grant probate of a will or letters of administration on the estate of a decedent, who, not domiciled here, died abroad—unless assets are found in this state; and then the *jurisdiction* belongs exclusively to the county where the assets are." (Italics ours.)

Other early cases under former statutes are those of **Hyatt v. James's Adm'r**, 1871, 8 Bush 9, 71 Ky. 9; **Turner's Adm'x v. Louisville & N. R. R. Co.**, 1901, 110 Ky. 879, 23 Ky. L. Rep. 340, 62 S. W. 1025, which was an action for wrongful death to a non-resident occurring in Kentucky and in which there was shown that decedent had debts due him in Boyle County and in commenting upon this situation the court said, "We are of opinion from the facts shown that there were debts due decedent by citizens of Boyle County, and therefore the county court therein *had jurisdiction* to appoint an administrator"; (italics ours) **Brown's Adm'r v. Louisville & Nashville Railroad Co.**, 1895, 97 Ky. 228, 17 Ky. L. Rep. 145, 30 S. W. 639, a wrongful death action involving a non-resident decedent where the court in speaking of the *jurisdiction* of a county court to appoint an administrator said on page 323 of the report:

"And we deem the court of the county where the injury was done and where the man died the proper court to entertain such *jurisdiction*." (Italics ours.)

Hall's Adm'r v. Louisville & Nashville R. R. Co., 1897, 102 Ky. 480, 19 Ky. L. Rep. 1529, 43 S. W. 698, a non-resident killed in Kentucky by the railroad, the court say-

ing that the county court of the county where the injuries were received was the only one having *jurisdiction* to appoint the administrator; a later case decided in 1924, **Walter's Adm'r v. Kentucky Traction & Terminal Co.**, 206 Ky. 100, 266 S. W. 887, is particularly in point here. The court again refers to the *jurisdiction* of county courts to grant administration and in discussing the situation uses this language upon page 388 of the Southwestern report:

> "From the averments of the petition it is clear that the county court of Bourbon county *had no jurisdiction* to appoint an administration of the estate of decedent, Walter, who was a resident of Fayette county, and who died there intestate; there being no facts alleged showing jurisdiction in the Bourbon county court. By special demurrer the question was made, whether the plaintiff had capacity to maintain the action. If the Bourbon county court did not have *jurisdiction* to appoint Harris administrator of the estate of Walter, a resident of Fayette county, *then he was not administrator of that estate, and if he were not administrator of that estate he had no interest in it, and could not maintain an action to recover damages for the wrongful death of Walter.*" (Italics ours.)

Petitioners' research fails to disclose any case in Kentucky in conflict with these early decisions. They all support petitioners' contention that the order of the Kenton County Court appointing respondent administrator is void because the court making same was *without jurisdiction* so to do. Further, that the District Court acquired no jurisdiction by the filing of the original libel because in effect *no administration was had in Kentucky* upon the estate of decedent.

No circuit court of Kentucky could entertain this action by respondent because it would have no jurisdiction unless the order of the Kenton County Court making such appointment was valid. **Jones' Adm'r v. Lay, et al.**, 1902,

23 Ky. L. Rep. 2113, 66 S. W. 720. This language appears in that case.

> "The Hardin county court had no authority or jurisdiction to appoint an administrator on his estate. Therefore the Hardin circuit court had no jurisdiction of this action."

Of course, if a circuit court of Kentucky lacks jurisdiction, the District Court of the United States would likewise be without jurisdiction since the foundation of the cause rests entirely in Kentucky law. Respondent, if properly appointed, could have pursued his remedy in an action at law in a Kentucky circuit court, or in admiralty. But in either event the jurisdiction of the court would be predicated upon the validity of the order appointing him as such administrator. In the instant case the order is void.

In 1942 in **Vassill's Adm'r v. Scarsella**, supra, the court said that a suit instituted by one in the position of respondent in the case at bar would "*possess no legal effect whatsoever.*" The exact language is found upon page 66 of the 166 S. W. (2d) report in these words:

> "In any event, the action as originally brought, as we have seen, was shown by the petition to be one which the plaintiff therein had no right in law to maintain, and being such, *it would logically appear to possess no legal effect whatever, and which this court so held* in the somewhat early case of **Louisville & N. R. R. v. Brantley's Adm'r**, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 29. The domestic case of **Marrett v. Babb's Ex'r**, 91 Ky. 88, 15 S. W. 4, also to the same effect, is cited in the opinion in the **Brantley** case as sustaining the conclusion therein approved. That holding (in the **Brantley** opinion) has never been departed from by any later opinion rendered by this court, but has been approved many times by subsequent opinions, which are listed in Shepherd's Kentucky Citations, page 330." (Italics ours.)

If the order of Kenton County Court possessed no legal effect whatsoever *because the court lacked jurisdiction* to enter it, then any suit attempted to be filed with such supposed order as its basis is the same as if none were commenced. That no circuit court of Kentucky did acquire jurisdiction in such case was held in **Jones' Adm'r v. Lay,** supra, and in referring to this opinion the Court of Appeals in **Jewel Tea Company v. Walker's Adm'r,** supra, said upon page 69 of the 161 S. W. (2d) report:

> "In the **Jones** case, supra, it was held that where an appointment of an administrator by a county court is void *for want of jurisdiction,* the circuit court has no jurisdiction of an action by the administrator suing under such void appointment." (Italics ours.)

If no Kentucky circuit court could acquire jurisdiction in such state of case, how could the District Court acquire such jurisdiction where the very cause of action itself is created by Kentucky law? The answer is that it could not.

In sustaining the special demurrers to the original libel (R. 9-11) the District Court read into this pleading the affidavit of respondent for leave to sue in forma pauperis which appears at R. 8-9. With the filing of this affidavit it appeared affirmatively of record that decedent had no estate in Kenton County, and, in fact, had no estate at all. The order of the District Court appearing at R. 15-16 indicates that this pauper affidavit was considered by the court in ruling on the special demurrer. It did so upon authority of **The Seminole,** 1890, 42 Fed. 924, where the court said:

> "These being facts which appear from the records of the court, and of which the court can take judicial notice without other proof than the record, I see no reason why it will not be the duty of the court, upon presentation of these facts in such a form, to dismiss the libel without compelling the claimant to await a

formal trial of the cause before presenting them to the court. I think, therefore, that the claimant may be permitted now to set forth these facts in an exceptive allegation; and upon the filing of such an allegation the libel will be dismissed, with costs."

The pauper affidavit showing no estate of decedent being filed, the court needed only to look on the record herein to determine that Kenton County Court was without jurisdiction to make the order appointing respondent administrator. To the same effect as **The Seminole** are the Kentucky cases of **McFeena's Adm'r v. Paris Home Telephone & Telegraph Co.**, 1921, 190 Ky. 299, 227 S. W. 450; **Board of Education of Cumberland County v. Jones**, 1922, 194 Ky. 603, 240 S. W. 65; **Maynard v. Allen**, 1939, 276 Ky. 485, 124 S. W. (2d) 765; **McNamara et al. v. New Horse Creek Coal Co. et al.**, 1942, 290 Ky. 276, 160 S. W. (2d) 625, and the textbook statements in Jones Commentaries on Evidence, 2nd Edition, Vol. 1, Sec. 431, page 764, and 20 Am. Jur., Sec. 86, page 104.

The Libel as Amended Did Not State a Cause of Action

The respondent, apparently perceiving his error in relying upon the void order of the Kenton County Court appointing him as administrator, on July 28, 1949, one year and forty days after death of his decedent, sought and obtained his appointment to the office of administrator by order of the County Court of Campbell County, Kentucky (R. 13). He pleaded this Campbell County appointment in his amended libel which he was by order of September 29, 1949, permitted to file (R. 15-16).

The attack made on the amended libel was by general demurrers (R. 16-18) on the ground that the amendment showed upon its face that the cause of action, if any there ever was, was barred by the Kentucky statutes of limitations. The office of demurrer was properly employed to

reach this patent defect in the pleading. **French v. Bowling**, 1905, 27 Ky. L. Rep. 639, 85 S. W. 1182; **Kentucky Coal & Timber Development Co. v. Kentucky Union Co.**, 1911, 187 Fed. 945.

The general demurrers to the libel as amended were sustained by order of September 26, 1949 (R. 19). From the memorandum of the District Judge filed on the same date (R. 19), it is apparent that he did so upon authority of **Vassill's Adm'r v. Scarsella** and **Jewel Tea Company v. Walker's Adm'r**, both supra.

Petitioners believe that the burden of respondent's argument opposing the general demurrers in the District Court, his argument in the Court of Appeals, and what he will probably present here, is that *granting leave to amend is a mere matter of procedure as distinguished from substantive law, and is therefore governed by the decisions of the federal courts even though such decisions be in conflict with those of the Court of Appeals of Kentucky.*

Petitioners' contention is that to allow the amended libel to stand against the demurrers and to relate back to the inception of the litigation, would permit respondent, by choice of a federal court, to obtain a result which would be denied him in a Kentucky tribunal; that the true test would seem to be whether a result different would obtain if the same cause between the same parties be litigated in a state as compared to a federal court. If so, the state rule must prevail under the holding of this Court in **Guaranty Trust Company v. York**, supra.

Coming now to the specific question, whether the amended libel may be related back to the date of the filing of the original libel so as to save the cause from the statute of limitations, it would seem that since the very cause of action itself is founded upon Kentucky law, that since every defense available to it in a suit in a Kentucky court is available in admiralty, there is no escape from the hold-

ing of the Court of Appeals of Kentucky in **Vassill's Adm'r v. Scarsella** and the **Jewel Tea** case. In the **Jewel Tea** case the Court on page 68 of the report in 161 S. W. (2d) stated the question as follows:

> "The first question to be determined is whether or not the order of the Webster county court appointing appellee administrator of the estate of decedent is void."

In the following paragraph of the case the Court said:

> "Since, however, the county court of Webster county was without jurisdiction to appoint an administrator of decedent's estate and the attempted appointment being void, ..."

The order of the Webster County Court was held to be void because *the County Court of Webster County was without* jurisdiction.

The unequivocal language of the Court of Appeals and the very basis for its decision is as follows:

> "We conclude, therefore, that since appellee's appointment as administrator was void he had no right to maintain this action and the court should have sustained appellants' motion to dismiss the case or peremptorily instructed the jury to find a verdict for the appellants."

That the **Jewel Tea** case in its pertinent features is an exact parallel of the case at bar is shown by the two following comparative columns:

Jewel Tea Case	**Case at Bar**
1. Decedent was a non-resident of Kentucky. (Illinois resident.)	1. Decedent was a non-resident of Kentucky. (New York resident.)
2. Death resulted in Kentucky from injuries sus-	2. Death resulted in Kentucky from injuries sus-

tained in an accident in a county other than that in which administration was taken out. (Accident in Muehlenberg County, administration in Webster County.)	tained in an accident in a county other than that in which administration was taken out. (Accident in Campbell County, administration in Kenton County.)
3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Webster County.)	3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Kenton County.)
4. Court of Appeals of Kentucky held appointment *void* upon the ground that Webster County Court was without jurisdiction to enter such order of appointment.	4. United States District Court (E. D. of Ky.) held appointment *void* upon the ground that Kenton County Court was without jurisdiction to enter such order of appointment.

It is significant that the Court of Appeals of Kentucky held the order of the Webster County Court to be *void*, not voidable. This Court is bound by the determination of the Kentucky Court of Appeals that in such state of fact, the inferior court (county court) was without jurisdiction to make such order. **Independent Warehouses, Inc. v. Scheele,** 1947, 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346; where the court in its opinion said that since the New Jersey Court of Errors and Appeals had held a certain New Jersey tax law to be valid, "Its ruling is conclusive upon us."

The parallel of the case of **Vassill's Adm'r v. Scarsella** with the case at bar may be indicated in this manner:

Vassill's Adm'r v. Scarsella	**Case at Bar**
1. Decedent was a non-resident of Kentucky. (Ohio resident.)	1. Decedent was a non-resident of Kentucky. (New York resident.)

2. Death resulted in Kentucky from injuries sustained in a county other than that in which administration was taken out. (Accident in Garrard County, Kentucky, administration in Hamilton County, Ohio.)
3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Hamilton County, Ohio.)
4. After the running of the statute of limitations plaintiff procured the appointment of administrator by the court of the county where injuries were received from which death resulted. (Garrard County, Kentucky.)
5. Plaintiff tendered an amended petition setting out the facts of the appointment of the administrator in the county where the injuries were received from which death resulted.
6. Objection was made by defendants to the filing of such amendment upon the ground that one year had elapsed from the time of the fatal accident to the deceased and the appointment of the administra-

2. Death resulted in Kentucky from injuries sustained in a county other than that in which administration was taken out. (Accident in Campbell County, Kentucky, administration in Kenton County, Kentucky.)
3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Kenton County, Kentucky.)
4. After the running of the statute of limitations respondent procured the appointment of administrator by the court of the county where injuries were received from which death resulted. (Campbell County, Kentucky.)
5. Respondent tendered an amended libel setting out the facts of the appointment of the administrator in the county where the injuries were received from which death resulted.
6. Objection was made by petitioners to the filing of such amendment upon the ground that one year had elapsed from the time of the fatal accident to the deceased and the appointment of the administrator

tor by the county court of the county where the injuries were received from which death resulted.	by the county court of the county where the injuries were received from which death resulted.
7. The court sustained the objection of defendants and declined to permit the amendment to be filed, followed by a dismissal of the petition after plaintiff declined to plead further.	7. The court overruled the objection of petitioners and permitted the amendment to be filed, but then sustained a general demurrer to such libel as amended and dismissed same after respondent declined to plead further.

The reason for the court's opinion in the **Vassill** case in rejecting the offered amendment was because same was tendered more than a year after the time of the fatal accident to the deceased and the appointment of the administrator in the county where the injuries were received by decedent and from which his death resulted. In affirming the circuit court's rejection of the amendment offered after the running of the statute of limitations the appellate court said on page 66 of the 166 S. W. (2d) report:

> "It is, therefore, clear that the original action filed by the foreign administrator as plaintiff, not being maintainable, could not and did not have the effect to toll or suspend the running of the statute of limitations against the maintenance of the action and, of course, did not have the effect to preserve the right of action in favor of some future qualified person to maintain it, after more than a year had expired from the commission of the tort as a foundation of the action. That being true, it would necessarily follow that an attempt after limitation had run to substitute as plaintiff in the cause the name of one possessing legal authority to maintain it in lieu of the one who originally filed it—but possessing no legal authority to do so—would not relate back to the time the original action was filed by the wholly disqualified plaintiff so

as to preserve the right of the tardy qualified plaintiff to maintain the action against the local limitation statute. Such interpretation was made and applied by this court in the cases of **Faulkner's Adm'r v. Louisville & N. R. R. Co.**, supra; **Fentzka's Adm'r v. Warwick Const. Co.**, 162 Ky. 580, 172 S. W. 1060; **Bannon v. Fox**, 199 Ky. 262, 250 S. W. 966, and **Louisville & N. R. R. v. Brantley's Adm'r** (on second appeal), 106 Ky. 849, 51 S. W. 585. To the same effect also is the text in Thompson on the Law of Negligence, Vol. 6, page 148, Par. 7017."

Similarly, in the case at bar the general demurrers to the libel as amended were sustained because the amended libel setting up the appointment of the administrator in Campbell County was at a date more than a year following the fatal accident to the deceased. The applicability to the case at bar of these principles of law laid down by the Kentucky Court of Appeals in these two cases is inescapable. Under the law of Kentucky which created respondent's cause of action, his cause was dead.

Respondent argued in the District Court and in the Court of Appeals that to grant or deny leave to amend is a matter of procedural and not substantive law, is controlled by the law of the forum, and that under the holding of this Court in **Missouri, Kansas and Texas Ry. Co. v. Wulf**, 1913, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, the amendment is proper and relates back to the date of the filing of the original pleading so as to save the cause from the bar of limitations. With this contention the Court of Appeals agreed and if its decision is not reversed it will establish not only a double system of conflicting laws in the same state but a double system in the same court in actions founded on the same state statute. If in the case at bar the jurisdiction of the federal court had been invoked because of diversity of citizenship, the original judgment of the District Court would of necessity be af-

firmed under **Guaranty Trust Co. v. York**, supra. Should the mere circumstance of the fatal accident to decedent having occurred upon a water highway of Kentucky instead of a turnpike, road or street, vest respondent in a federal admiralty court with a right denied him in a federal court of common law? To answer affirmatively would do violence to **Guaranty Trust Co. v. York** which has been thought to express a federal policy (**Rose v. U. S.**, 1947, 73 F. Sup. 759, at page 763). The result of this litigation, founded as it is upon a state-created right, should be the same as if tried in a Kentucky court.

In **Guaranty Trust Co. v. York**, supra, at 326 U. S. at pages 108-110, the Court said:

> "Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may, at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, *it cannot afford recovery if the right to recover is made unavailable by the State* nor can it substantially affect the enforcement of the right as given by the State. (Italics ours.)
>
> "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

"It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. **Erie R. Co. v. Tompkins** was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies **Erie R. Co. v. Tompkins** is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof. **Cities Serv. Oil Co. v. Dunlap**, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, **Klaxon Co. v. Stentor Electric Mfg. Co.**, 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, **Palmer v. Hoffman**, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see **Sampson v. Channel**, 110 F. (2d) 754. **Erie R. Co. v. Tompkins** has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.

"Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a

diversity case should follow State law. See **Morgan, Choice of Law Governing Proof** (1944), 58 Harvard L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."

It is of no consequence that the rule in **Guaranty Trust Co. v. York** has as yet not been applied to a case in admiralty for wrongful death founded upon a state statute. The reason for the application of the rule exists and it ought now to be applied to the case at bar. The mere choice by respondent of a federal court forum ought not to give him any rights which are denied him in a Kentucky court. Kentucky denies the right to amend after the running of the statute of limitations. The federal courts should do likewise.

Why should not the reasoning in **Guaranty Trust Co. v. York** control here? It would be difficult to distinguish between the rule to be applied in a diversity case founded upon a state-created right and this cause of action asserted in admiralty and likewise founded upon a state-created right. It would seem incongruous to accord respondent an advantage by reason of his having chosen the United States District Court as a forum which would be denied him had he sought relief in a court of Kentucky from which Commonwealth he derives his very right to sue at all.

In argument below respondent asked the court to follow what he terms the federal rule where it might aid him, but reject such rule where it works to his disadvantage.

To illustrate: He argued the merits of the **Wulf** case to support his amended libel but airily tossed aside **Guaranty Trust Co. v. York** where it hurts. If this Court is to follow **Wulf** it cannot follow **Guaranty Trust Co.** So far as these decisions apply to the case at bar they are irreconcilable and a choice must be made between them. The **Wulf** case was one of diversity. The case at bar is in admiralty. Respondent asks the application of the rule in the *diversity* case of **Wulf** but denies the effect of the rule in the *diversity* case of **Guaranty Trust.** The case at bar in admiralty is similar in certain respects to a diversity case. As has been heretofore stated, the twin birth of admiralty and diversity jurisdiction is occasioned by Article III, Section II, of the Constitution of the United States. It has also been pointed out that where a right is being asserted by one whose cause is founded upon state statute, all defenses under the state law are available to his opponent whether such cause be in admiralty, or at law or equity, in a case of diversity. This is necessarily so in the case at bar because respondent has no cause of action except for the law of Kentucky. The United States District Court is merely a forum in which the right provided by the law of Kentucky may be enforced. So we say that opinions of the courts in diversity cases upon the point at issue here are equally applicable as opinions based upon litigation solely within the admiralty jurisdiction of the court where such diversity cases arise solely upon a cause of action founded upon state law. It is not sufficient to say that the granting or denying leave to amend is a mere matter of procedure, as distinguished from substantive law, and is therefore governed by the decisions of the federal courts even though such decisions be in conflict with those of the Court of Appeals of Kentucky. The objection to the amendment goes deeper than that. It strikes at the very right to maintain the action at all. The question for determination

is not whether the matter is substantive or procedural, *but, does it significantly affect the result of litigation for a federal court to disregard a law of Kentucky that would be controlling in an action between the same parties in a Kentucky court?*

With this thought in mind we quote from the case of **Berry v. Franklin Plate Glass Corp.**, 1946, 66 F. Supp. 863, pages 866 and 867:

> "It appears to me that it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of the United States rather than of state courts in order to gain the advantage of different laws. In other words, in all cases where the federal court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court.
>
> "As the matter intimately affects recovery or nonrecovery, a federal court in a diversity case must follow the State law since it is more important than desirable for federal courts to achieve uniformity with state administration of State law. This objective cannot be achieved if the federal court is free to make determinations independent of state law, where freedom will, almost as a matter of law, yield a result substantially different from that which would have been obtained in the state where the federal court sits. For example, if the federal court and the state court would be situate in adjoining buildings and the action would have been filed in the state court, one rule of law would have application; while if the party litigant filed his action in the federal court, another rule of law would have application. The critical test, therefore, is whether an important difference in result will be

made possible if state law is not applied. If a different result would arise under the same facts and circumstances, the state law should control."

To the same effect is **Overfield v. Pennroad Corporation**, 1944, 146 F. (2d) 889, where Judge Jones said in his concurring opinion:

> "Federal jurisdiction of the instant cases rests solely on the ground of diversity of citizenship. The applicable law, therefore, is the law of the State local to the situs of the District Court. The rule of **Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, is equally pertinent to federal court equity suits where jurisdiction depends upon diversity of citizenship. **Ruhlin v. New York Life Insurance Co.**, 304 U. S. 202, 205, 58 S. Ct. 860, 82 L. Ed. 1290. Furthermore, a federal court, so bound, must follow the local rule of conflicts as well."

It is submitted that respondent cannot distinguish between the rule to be applied in a diversity case founded upon a state-created right and his cause of action in admiralty founded upon a state-created right. Respondent was enabled to seek relief in a court of admiralty only because of the geographical fact that the fatal accident occurred upon navigable waters within the jurisdiction of the admiralty. His case is not one within the exclusive jurisdiction of the admiralty and admiralty alone would avail him nothing in his effort to recover damages for this allegedly wrongful death. Kentucky gave him this right, not the law of admiralty or the rules of procedure in an admiralty court, neither of which would give him any relief at all. There can be no question but what the defense as presented in the District Court and by it resolved in favor of petitioners, was available to them in the courts of Kentucky. The conclusion would seem to be inescapable, that the law as enunciated by the Court of Appeals of Ken-

tucky must prevail as opposed to any rule in admiralty or diversity cases which would permit an amendment such as we find in the record in the case at bar.

There is no basis in reason to argue that uniformity in the admiralty practice requires affirmance. Uniformity is not required under the "maritime but local" doctrine. See **Just v. Chambers,** supra, 312 U. S. at page 392, where it was said:

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate."

It may be argued here by respondent as it was by him in the courts below that the Kentucky statute of limitations is not a part of the statute creating the right of action and conceding that the substantive right is dependent upon Kentucky law, contend that the limitation being embodied in a general statute of limitations, such limitations statute is procedural and is not construed as conditioning rights. However, in view of the decision of this Court in **Western Fuel Company v. Garcia,** supra, it would seem to make absolutely no difference whether the statute of limitations be a part of the statute creating the right of action or whether such limitation is embraced in a general statute of limitations. In **Western Fuel Company**

v. **Garcia** suit was brought in the District Court of the United States for the Northern District of California in admiralty for wrongful death of one Manuel Souza occurring upon the navigable waters of and within the State of California. The California wrongful death statute is set forth in Deering's California Code of Civil Procedure, Section 377. This action merely creates the cause of action for wrongful death but does not limit the time within which such cause of action must be instituted. The time limit is set by a general statute of limitations embraced in Subsection 3 of Section 340 of the same code which is a general statute of limitations of California.

Garcia sued as administrator for the death of Souza relying upon the California wrongful death statute. **Western Fuel Co.** denied liability and relied upon the general statute of limitations which required an action for damages consequent upon death caused by wrongful act of negligence to be brought within one year, as does Kentucky Revised Statutes Sec. 413.140. The District Court held in favor of the administrator and awarded substantial damages; the Circuit Court of Appeals sent up the whole case to the United States Supreme Court under its direction. The holding of the United States Supreme Court was as said in 257 U. S. at page 243: *"In the present cause the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the state statute of limitations.* Accordingly, its judgment must be reversed, and the cause remanded there, with instructions to dismiss the libel." (Italics ours.)

But whether the Kentucky limitations statute conditions respondent's right under her wrongful death statute, or is considered as only procedural, is of no consequence. The rule of **Erie Railroad v. Tompkins** and **Guaranty Trust Co. v. York** compels that no substantially different result obtain whether one view or the other be correct. And Ken-

tucky law says, "No recovery to respondent." So also should be the pronouncement here. **Ragan v. Merchants Transfer & Warehouse Co.**, 1949, 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520, would seem to compel it. There the court at pages 533-4 of 337 U. S. said:

> "But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See **Cities Serv. Oil Co. v. Dunlap**, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201; **Palmer v. Hoffman**, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. It accrues and comes to an end when local law so declares. **West v. American Teleph. & Teleg. Co.**, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179, 132 A. L. R. 956; **Guaranty Trust Co. v. York**, 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231, supra. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of **Erie R. Co. v. Tompkins** is transgressed.
>
> "We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with **Erie R. Co. v. Tompkins.**"

CONCLUSION

Unless we are to have confusion destructive of the reign of law, the opinions and judgment of the Court of Appeals must be reversed with instructions to enter a judgment affirming the original judgment of the District Court entered on October 5, 1949, as same appears at R. 21. To otherwise decide, respondent, by his choice of a federal court to enforce a right given him by Kentucky, will attain an end denied him in her courts.

It must be conceded that if the present case were in a Kentucky court it would be barred. The theory of **Guaranty Trust Co. v. York** would therefore seem to bar it here. The force of that reason is sought to be avoided by saying that it has not yet been extended to cases in the admiralty. If it has not been so extended, it ought to be.

Respectfully submitted,

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